Glenn Katon SBN 281841
KATON.LAW
385 Grand Avenue, Suite 200
Oakland, CA 94610
gkaton@katon.law
(510) 463-3350

Attorney for Plaintiff David P. Demarest

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID P. DEMAREST,

Plaintiff,

v.

CITY OF VALLEJO, CALIFORNIA, et al.

Defendants.

Case No. 2:16-cv-02271-MCE-KJN

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: Morrison C. England, Jr.

Hearing: April 18, 2019 at 2:00 p.m.
Courtroom 7, 14th floor

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I. INTRODUCTION

Plaintiff Demarest moves for summary judgment on the issue of liability for the City of Vallejo's ("City") violation of the Fourth Amendment, which is his Ninth Cause of Action in the First Amended Complaint (Dkt 13). He is not seeking summary judgment for the damages he sustained as a result of the Fourth Amendment violation, which he intends to present to the jury for determination. He is also not seeking summary judgment on his First Cause of Action for the excessive use of force used by Defendant Jodi Brown because there are disputes of fact on the amount of force she used and whether such force was objectively reasonable.

The City violated Demarest's Fourth Amendment right against unreasonable seizures by subjecting him to unlawful traffic checkpoint at which Officer Brown required him to produce a driver's license and arrested him for refusing to do so. The Supreme Court has ruled that sobriety checkpoints are constitutional if certain criteria are met; however, it has never held that driver's license checkpoints are constitutional. When the Court has addressed the issue of driver's license checkpoints it has been based upon the premise that they would be used for the purpose of keeping unlicensed drivers off the road. Here, however, the City has stipulated and otherwise made clear that its purpose in checking drivers' licenses is not to keep unlicensed drivers off the road. Rather, the purpose is to learn who the driver is and show the authority of the police department, neither of which is a constitutionally permissible purpose under the Fourth Amendment.

Accordingly, the Court should grant Demarest's motion for summary judgment on the City's liability pursuant to his Ninth Cause of Action for violating the Fourth Amendment.

II. STATEMENT OF FACTS[1]

A. The City Of Vallejo Operated a Checkpoint on the Evening Of September 26, 2014 for the Purposes of Verifying Sobriety and Deterring Intoxicated Driving.

On the evening of September 26, 2014, the City operated a checkpoint on the corner of Sonoma Boulevard and Solano Avenue ("the Checkpoint") at which all drivers were stopped without individualized suspicion. (Ex. A, DUI Checkpoint Operation Plan SC 14445.) The purpose of the Checkpoint was to remove intoxicated drivers from the road and to deter intoxicated driving. (Ex. B, Nichelini Dep. 23:24-24:1.) Removing unlicensed drivers from the road and deterring unlicensed driving was *not* a purpose of the Checkpoint. (Ex. C, Stipulation on Discovery and Issues in Dispute); (Ex. B, Nichelini Dep. 24:12-14). Nevertheless, the City required every motorist who entered the Checkpoint to provide identification such as a driver's license or a passport. (Ex. A, DUI Checkpoint Operation Plan SC 14445; Ex. B, Nichelini Dep. 26:7-22.)

B. Plaintiff David Demarest Is Stopped At the Checkpoint and Officer Jodi Brown Detains and Arrests Him for Not Providing a Driver's License.

At approximately 7:15 p.m. on September 26, 2014, Plaintiff Demarest entered the Checkpoint. (Ex. D, Narrative of Office Brown's Observations.) When he did, Officer Jodi Brown asked him for his driver's license. (Ex. E, Brown Dep. 31:24-32:16.) While Demarest confirmed that he had a driver's license in his possession, he declined to provide it to Brown. (Ex. E, Brown Dep. 33:2-3.) Brown asked again for Demarest's license and continued to detain him at the Checkpoint after his initial refusals. She then informed Demarest that she would arrest him if he did not produce his license. (Ex. E, Brown Dep. 34:12-13.) After what she claimed was either four or five refusals, Brown did, in fact, arrest Demarest, purportedly for refusal to provide identification under California Vehicle Code § 40302(a). (Ex. D). She later added a charge for obstructing a police officer under California Penal Code § 148. (Ex. E, Brown Dep. 47; Ex. F, Vallejo Police Department Crime Report; Ex. G, On-View & Probable Cause Declaration Information Form.)

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[1] Since this is Plaintiff's motion for partial summary judgment, the following facts are provided in the light most favorable to Defendants. *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

C. Demarest's Three-Inch Utility Knife.

After Officer Brown took Demarest to the police station and was in the process of booking him, she noticed he had rope or chain around his neck holding a sheathed knife under his shirt. (Ex. E, Brown Dep. 68:22-69:4). It was a three-inch long multipurpose utility knife. (Ex. H, Demarest Dep. 72:17-24.) Based upon the discovery of that item, Brown added a felony concealed weapon offense to Demarest's charges. (Ex. E, Brown Dep. 69:17-19; Brown Dep. Ex. 5.) Pursuant to the City's practices, a nail file, comb, and pencil could fit the definition of a "dirk or dagger" within the meaning of the concealed weapon statute with which Demarest was charged with violating. (*See* Ex. I, Whitney Dep. 14:20-15:12; 16:24-17:6; 18:8-24; Whitney Dep. Exs. 1-3).

III. STANDARD OF REVIEW

A party may move for summary judgment by "identifying each claim or defense—*or the part of each claim* or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a) (emphasis added). Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. *Id.* Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court may not weigh the evidence and must view the evidence in the light most favorable to the nonmoving party. *Id.* at 255.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Id.* at 322–23. However, on an issue for which its opponent will have the burden of proof at trial, the moving party can prevail merely by "pointing out to the District Court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. If the moving party meets its initial burden, the opposing party

must then "set forth specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 250.

IV. ARGUMENT

The City violated Demarest's Fourth Amendment right to be free from unreasonable seizure in three ways. First, the City's initial seizure of Demarest was unlawful because he was required at the Checkpoint to produce his driver's license without any suspicion he had committed a crime or infraction. Second, the requirement of producing a license is not "sufficiently productive" to the purposes of catching and deterring drunk drivers, which are the purposes of the Checkpoint claimed by the City. Third, the City's detention of Demarest at the Checkpoint was not minimally intrusive for a sobriety check purpose.

A. The Checkpoint Was Unconstitutional.

The initial seizure of Demarest violated the Fourth Amendment because the Checkpoint did not comply with constitutional requirements of a sobriety check: the Checkpoint required identity verification; the Checkpoint's mandatory identity verification was not sufficiently productive for a sobriety check purpose; and the Checkpoint was not minimally intrusive vis-à-vis its sobriety check purpose because it detained drivers until they verified their identity.

1. The law on checkpoints.

Stopping a vehicle at a checkpoint constitutes a seizure of a person within the meaning of the Fourth Amendment. *Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 450 (1990). While a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, the Supreme Court has recognized "limited circumstances in which the usual rule does not apply." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Several factors must be present in order for a suspicionless automobile checkpoint to pass constitutional scrutiny. First, there must be a legitimate state interest at stake. *Id.* Removing intoxicated drivers from the road is one such purpose. *Sitz,* 496 U.S. at 451. Keeping unlicensed drivers off the road may be another. *See Ashcroft v. Al-Kidd*, 563 U.S. 731, 737 (2011) (dicta). General crime enforcement–such as detecting narcotics–is not a permissible purpose. *Edmond*, 531 U.S. at 37. Second, a checkpoint must serve to promote the state interest in a

"sufficiently productive" fashion. *Delaware v. Prouse*, 440 U.S. 648, 660 (1979). For example, roving license "spot checks" are not sufficiently productive for discovering or deterring unlicensed drivers to qualify as a reasonable law enforcement practice under the Fourth Amendment. *Id.* Third, a checkpoint must be minimally intrusive: (1) it must be clearly visible; (2) it must be a part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) it must detain drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity. *See id*. at 662; *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976); *Brown v. Texas*, 443 U.S. 47, 51 (1979).

2. The Checkpoint's purpose of verying identity is not permissible under the Fourth Amendment.

While a sobriety checkpoint may be permissible if certain criteria are met, the City's compulsory identity verification of *all* motorists who entered the Checkpoint–an aim independent of a sobriety assessment–rendered the Checkpoint unconstitutional under the Fourth Amendment.

The City alleges that this was a sobriety checkpoint aimed at removing intoxicated drivers from the road and deterring intoxicated driving. (Ex. B, Nichelini Dep. 23:24-24:1.) The City also asserts unequivocally that keeping unlicensed drivers off the road was *not* a purpose of the Checkpoint. (Ex. C Stipulation on Discovery and Issues); (Ex. B, Nichelini Dep. 24:12-14.)

In addition to observing drivers for signs of intoxication, the City required every driver to produce their driver's license.[2] (Ex. A, DUI Checkpoint Operation Plan SC 14445; Ex. B, Nichelini Dep. 26:13-16.) The City imposed this requirement despite having no interest in enforcing license requirements. Instead, the City required drivers to produce their license because officers "would like to know who we are talking to" even though they do not check for warrants or otherwise determine if the driver is dangerous. (Ex. B, Nichelini Dep. 21:20-24). The other purpose of the City requiring drivers to provide their license is a show of the officers' authority. *Id*. 24:15-18; 41:22-25.

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[2] The City asserts that, in limited instances, it would accept a passport for identity verification instead of a driver's license. (Ex. B, Nichelini Dep. 26:10-22.)

The City's identity verification purpose, unrelated to enforcement of license laws, is unconstitutional. The Supreme Court has held that a narcotics checkpoint was unconstitutional because a state's interest in general crime enforcement does not justify a suspicionless seizure at an automobile checkpoint. *Edmond*, 531 U.S. 32 at 44. There, the Court stressed that it previously upheld checkpoints only where their purpose was related to policing the border or roadway safety. *Id.* at 41 ("each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety"). Here, the City's purposes of "knowing who we're talking to" and showing police authority have no relation to traffic safety and, instead, are aimed at general crime enforcement and deterrence. Accordingly, they are unconstitutional and any seizure at the Checkpoint related to this purpose violates the Fourth Amendment.

3. The Checkpoint was unconstitutional because the methods the City used were not "sufficiently productive" in relation to the Checkpoint's stated sobriety check purpose.

The City's Checkpoint also fails Fourth Amendment scrutiny because the methods the City used at the Checkpoint were not "sufficiently productive" in relation to the Checkpoint's potentially lawful sobriety check purpose. *Prouse*, 440 U.S. at 660. In fact, it is not at all clear how requiring a driver to produce a license would be productive for purposes of catching drunk drivers or deterring drunk drivers.

4. The Checkpoint was unconstitutional because it was not minimally intrusive.

The Checkpoint further fails constitutional scrutiny because it was not minimally intrusive. In order to be minimally intrusive, an automobile checkpoint: (1) must be clearly visible; (2) must be a part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) *must detain drivers no longer than is reasonably necessary to accomplish their lawful purpose*, unless other facts come to light creating a reasonable suspicion of criminal activity. *See Prouse,* 440 U.S. at 662; *Martinez-Fuerte*, 428 U.S. at 558-59; *Brown* , 443 U.S. at 51. Here, the Checkpoint's only lawful purpose was a sobriety check. However, the Checkpoint detained drivers longer than reasonably necessary to evaluate sobriety because it detained drivers until they identified themselves and produced

verification of identity in the form of a driver's license. The additional time required to produce a license bore no relationship to the lawful purpose of assessing sobriety.

B. The City's Continued Seizure of Demarest In Order to Obtain Demarest's Driver's License Was Unconstitutional.

Even assuming, *arguendo*, the City's initial seizure was constitutional, the City's continued seizure of Demarest–in which it refused to release him from the Checkpoint until he provided his license for the purposes of verifying his identity–was unconstitutional. An initially permissible checkpoint seizure may transform into an impermissible one by further intrusions not based upon individualized suspicion or consent. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *see also Sitz*, 496 U.S. at 451. Here, the City extended Demarest's detention at the Checkpoint for a reason unrelated to the stated sobriety-related purpose of the seizure: namely, Demarest's refusal to provide proof of identity upon command. (Ex. E, Brown Dep. 34:12-13.) The City's continued seizure of Demarest was, therefore, unreasonable under the Fourth Amendment.

C. The City's Arrest of Demarest Was Unconstitutional.

Even further assuming that the City's initial and continued seizure of Demarest was constitutional, the City's arrest of Demarest was not. The City arrested Demarest for suspicion of violating California Penal Code ("PC") § 21310, PC § 148(a)(1), and California Vehicle Code ("VC") § 40302. (Ex. F, Vallejo Police Department Crime Report.) PC § 21310 is a "concealed dirk or dagger" statute. However, the City did not discover the purported dirk or dagger until after arresting Demarest. (Ex. E, Brown Dep. 69:2-8.) Thus, because Demarest was already being booked at the police station when Officer Brown discovered the alleged dirk or dagger, Demarest's possession of it cannot form the constitutional basis for the arrest. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer *at the time of the arrest*).

Further, neither VC § 40302 nor PC § 148(a)(1) justifies Demarest's arrest under these circumstances. VC § 40302 does not require an individual to provide identification to a police officer upon demand. Rather, it only provides the circumstances under which an already arrested person must be taken before a magistrate. Thus, because VC § 40302 does not require an individual to provide

identification upon demand, it cannot provide the underlying basis for an arrest for obstruction based on the refusal to provide a license.

The City may try to rely on VC § 12951(b)[3] and VC § 4462(a),[4] to establish that Officer Brown had probable cause to arrest Demarest for obstruction on the basis of his refusal to provide his driver's license. This reliance would be misplaced. The California Supreme Court declared that the purposes of those statutes are "plain:" "[a]n officer who has stopped a vehicle for a traffic infraction and who plans to issue a citation needs to ascertain the true identity of the driver and the owner of the vehicle, in order to include that information on the citation and the written promise to appear." *In re Arturo D.* (2002) 27 Cal 4th 60, 67. Here, Demarest had not been stopped for a traffic infraction; therefore, the purpose of those statutes does not apply. Neither was Demarest stopped on the basis of reasonable suspicion. *See Hiibel v. Sixth Judicial Dist. Court of Nev.* 542 U.S. 177, 188 (2004) (Nevada is able to enforce its "stop and identify" statute only in the context of a lawful *Terry* stop in which the request for identification is reasonably related to the circumstances justifying the stop.) Thus, if the City argues that the license check statutes justify Demarest's arrest in these circumstances, it is defending its ability to enforce the statutes at a suspicionless stop for a purpose unrelated to license verification and in the absence of either a traffic infraction or reasonable suspicion of some other violation. The statutes, which exist for the purpose of assisting law enforcement to ascertain the identity of a driver who committed some other traffic infraction, do not provide the broad authority to arrest individuals for refusal to identify themselves at a checkpoint that is not otherwise constitutionally supported on license check grounds.

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[3] VC § 12591(b) provides: "The driver of a motor vehicle shall present his or her license for examination upon demand of a peace officer enforcing the provisions of this code."

[4] VC § 4462(a) provides: "The driver of a motor vehicle shall present the registration or identification card or other evidence of registration of any or all vehicles under his or her immediate control for examination upon demand of any peace officer."

D. The City Cannot Mitigate Damages for Demarest's Arrest Based Upon the Alleged "Dirk or Dagger" Violation.

When Officer Brown discovered a three-inch utility knife sheathed on a string around Demarest's neck, she further based his arrest on a violation of Penal Code § 21310, which provides that "any person in this state who carries concealed upon the person any dirk or dagger is punishable by imprisonment. . . ." The legislature has defined "dirk" or "dagger" as "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that *may inflict great bodily injury or death*." Penal Code § 16470 (emphasis added). The definition of a knife or other instrument that may inflict great bodily injury is so vague as to be meaningless, in violation of the Due Process Clause of the Fourteenth Amendment. *See Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (holding that insufficiently precise statute violates the Due Process Clause of the Fourteenth Amendment).

The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. *See, e.g., Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 494-95 (1982); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979). The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *U.S. v. Natl. Dairy Products Corp*., 372 U.S. 29, 33 (1963) (citing *Robinson v. U.S*., 324 U.S. 282 (1945)).

The conduct with which Demarest was charged – carrying a three-inch utility knife around his neck – must be measured against the language of a statute prohibiting the carrying of a concealed instrument that may inflict great bodily injury or death. An ordinary person simply could not be expected to understand whether a small knife or other instrument "may" inflict great bodily injury or death. Indeed, it might be impossible to determine the types of items that "may" cause such injury. The City has made clear that a nail file, comb, and pencil could fit the definition of a "dirk or dagger"

within the meaning of the statute and it is submitted that an ordinary person would not understand that carrying one of those items in their pocket could get them convicted of a felony. (*See* Ex. I, Whitney Dep. 14:20-15:12; 16:24-17:6; 18:8-24; Whitney Dep. Exs. 1-3). It is further submitted that an ordinary person would not understand that having a three-inch utility knife around your neck constitutes carrying "a knife or other instrument . . . that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death." Penal Code § 16470.

Thus, the City cannot mitigate the damages for its Fourth Amendment violation by claiming that its arrest of Demarest was lawful under Penal Code § 21310, because the definition of "dirk or dagger" in Penal Code § 16470 is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

V. CONCLUSION

Based upon the foregoing, Plaintiff's Motion for Summary Judgment as to the City's liability for his Fourth Amendment unreasonable seizure should be granted.

Respectfully Submitted,

/s/ Glenn Katon

GLENN KATON
Attorney for Plaintiff